BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBBY W. ANDERSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,022,560
BLUE RIBBON FARM & HOME	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the Award of Administrative Law Judge Kenneth J. Hursh dated June 5, 2006. Claimant was awarded benefits for a 20 percent permanent partial disability to the body as a whole. The Appeals Board (Board) heard oral argument on September 26, 2006.

APPEARANCES

Claimant appeared by his attorney, Kala Spigarelli of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas D. Johnson of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

1. What was claimant's average weekly wage on the date of accident?

2. What is the nature and extent of claimant's injuries and disabilities?

3. Does the Social Security offset in K.S.A. 44-501(h) apply to this matter?

4. Is claimant entitled to future medical treatment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 20 percent permanent disability to the left lower extremity pursuant to K.S.A. 44-510d. An offset for the Social Security benefits being received by claimant will be assessed against the temporary total disability compensation, but will not be assessed against the amount awarded for claimant's functional impairment.

Claimant, a long-term employee of respondent, was injured on May 12, 2004, when several cattle panels fell on him. The cattle panels knocked claimant over, breaking his left greater trochanter. Claimant was transported to the emergency room at Mt. Carmel Regional Medical Center. Claimant spent the night in the hospital and was later transferred to the care of board certified orthopedic surgeon Michael P. Zafuta, M.D.

Claimant first saw Dr. Zafuta on May 12, 2004, the date of accident. Claimant was treated conservatively, without surgery. Claimant was prescribed a walker and pain medication. Claimant was released to sedentary work on May 27, 2004, and restricted to sit-down work, with no lifting, carrying, climbing or walking. Claimant returned to respondent with Dr. Zafuta's restrictions and was returned to work, light duty, by respondent. This light-duty work involved packaging seeds. The light-duty work eventually ended and claimant's restricted duty ended. Dr. Zafuta continued to treat claimant until March 7, 2005, at which time claimant was found to have reached maximum medical improvement. Claimant was released to return to sedentary work, with no lifting, climbing or carrying allowed.

Dr. Zafuta rated claimant pursuant to the fourth edition of the AMA *Guides*[1] at 20 percent to the hip. However, on cross-examination, he clarified that the break in claimant's bone occurred just below the hip joint, in the intracapsular joint. He acknowledged the fracture was not truly into the joint. He later modified his rating to 20 percent to the body when he saw that claimant was using a cane. However, he acknowledged that he never suggested that claimant use a cane.

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant returned to respondent with the light-duty restrictions on March 21, 2005. Dane Shultz, respondent's owner, testified that he intended to return claimant to work within the doctor's restrictions, but when claimant did not return to work for two weeks after being released on March 7, 2005, claimant was classified as fired.

At the time of the regular hearing, claimant was 67 years old, and had been receiving Social Security retirement benefits since he was 62, in 1999. When claimant started receiving Social Security retirement benefits, his work hours with respondent were dropped from 40 hours per week to 35 hours per week. Since being fired from respondent, claimant has made no effort to look for work.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

At the time of his accident, claimant was earning $5.50 per hour and working 35 hours per week. Claimant received no fringe benefits. This hourly rate computes to an average weekly wage of $192.50 and a weekly compensation rate of $128.34. This average weekly wage and compensation rate were determined and utilized by the ALJ in the Award. The Board agrees with and affirms those findings.

K.S.A. 44-510d, the scheduled injury statute, restricts an injured worker's right to compensation when the worker's injuries are listed therein. K.S.A. 44-510d states in part:

> (b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability . . . .[4]

The only medical opinion in this record is that of Dr. Zafuta, who assessed claimant a 20 percent impairment to the hip, later changing that rating to a whole body rating when he saw claimant using a cane, even though he did not recommend a cane for claimant. However, when asked to identify the exact location of the injury, he identified the greater

---

[2] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-510d(b).

trochanter. He stated, "[i]f you define that as intra – what we call intracapsular joint fracture, then it is not truly into the joint in that respect."[5]

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[6]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[7]

The Board finds the opinion of Dr. Zafuta supports a finding that claimant's injury and disability is located in the leg, rather than in the hip. Therefore, the award is controlled by K.S.A. 44-510d.

The Board must next consider K.S.A.44-501(h), which states:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.[8]

Both the Kansas Supreme Court and the Kansas Court of Appeals have interpreted K.S.A. 44-501(h). The Supreme Court, in *Dickens*,[9] was asked to decide whether a retired person, who works to supplement Social Security retirement income, then suffers a second wage loss when injured in the course of employment. The claimant, in *Dickens*,

---

[5] Zafuta Depo. (Apr. 6, 2006) at 6.

[6] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[7] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[8] K.S.A. 44-501(h).

[9] *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601(1999).

had retired at 64. One year after retirement, he took a job with Pizza Hut to supplement his Social Security income. The Supreme Court, in quoting *Boyd*,[10] stated:

> Workers such as the plaintiff here, who are already retired and receiving social security old age benefits before starting work on a part-time job to supplement those benefits, suffer a second wage loss when they are injured in the course of their employment.[11]

However, the Kansas Court of Appeals, in *McIntosh* ,[12] was asked whether the offset provisions in K.S.A. 44-501(h) applied to a claimant who was injured while receiving Social Security benefits, but before that worker actually retired. The Board, in affirming the ALJ and citing *Dickens*, determined the offset did not apply. The Court of Appeals, in reversing the Board, found the circumstances in *McIntosh* to be "markedly different from those in *Dickens*.[13] The claimant in *McIntosh*, while planning to retire, had not actually done so. The Appeals Court found it significant that the claimant in *McIntosh* continued working "full-time" doing the same job as before.[14]

The distinction between *Dickens* and *McIntosh* deals with the timing of the retirement. A claimant who retires and then returns to work before suffering an injury will not be assessed the offset. A worker who continues to work, without retiring, even while collecting Social Security retirement benefits, will be assessed the offset.

Here, claimant was receiving the benefits, but continued working after the benefits began in 1999, when claimant was 62 years old. There was no indication in this record that claimant had retired, although his hours did reduce when the benefits began. The Board finds the reasoning of *McIntosh* applies to this situation, and the offset of K.S.A. 44-501(h) will be assessed.

---

[10] *Boyd v. Barton Transfer & Storage*, 2 Kan. App. 2d 425, 580 P.2d 1366, *rev. denied* 225 Kan. 843 (1978).

[11] *Dickens* at 1071, *quoting Boyd* at 428.

[12] *McIntosh v. Sedgwick County*, 32 Kan. App. 2d 889, 91 P.3d 545 (2004).

[13] *Id*. at 897.

[14] *Id*. at 897.

The statute does limit the application of the offset in that claimant is guaranteed his functional impairment.[15] However, that protection does not apply to claimant's temporary total disability benefits.

The Award of the ALJ is, therefore, modified to award claimant a 20 percent permanent partial disability to claimant's left lower extremity, but affirmed with regard to the application of the offset provisions of K.S.A. 44-501(h) against claimant's temporary total disability benefits. As the Social Security weekly benefit amount is greater than the weekly workers compensation benefit, claimant would not be entitled to this benefit. Respondent's entitlement to an offset is controlled by K.S.A. 44-525(c).

The Board affirms the ALJ's ruling that any claims for future medical benefits would be determined pursuant to K.S.A. 2003 Supp. 44-510k.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated June 5, 2006, should be, and is hereby, modified to award claimant a 20 percent permanent partial disability to the claimant's left lower extremity. The offset provisions of K.S.A. 44-501(h) are applied to the claimant's temporary total disability payments. Per the statute, no offset is allowed for temporary partial disability payments. Temporary partial disability was paid in the amount of $1,236. In computing the award, this calculates to 9.63 weeks temporary total disability compensation which number will be utilized in the final computations.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bobby W. Anderson, and against the respondent, Blue Ribbon Farm & Home, and its insurance carrier, Continental Western Insurance Company, for an accidental injury which occurred on May 12, 2004, and based upon an average weekly wage of $192.50. Respondent and its insurance carrier shall pay no temporary total disability benefits due to the offset provisions of K.S.A. 44-501(h), and shall be entitled to a credit in the amount of $4,045.59, for the temporary total disability payments already made, pursuant to K.S.A. 44-525(c).

Claimant is entitled to $1,236 in temporary partial disability compensation, which calculates to 9.63 weeks of temporary total disability as stated above. Thereafter, claimant is entitled to 38.07 weeks of permanent partial disability compensation at the rate of $128.34 totaling $4,885.90 for a 20 percent permanent partial impairment to the left lower extremity, for a total award of $6,121.90. After applying the credit under K.S.A.

---

[15] K.S.A. 44-501(h).

44-525, claimant is entitled to $2,076.31, all of which is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, she must file and submit her written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this ____ day of October, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members disagree with the majority's decision to apply the Social Security retirement offset against the temporary total disability compensation. This is not what was intended when the legislature enacted K.S.A. 44-501(h) in 1993. The purpose of the retirement offset was to avoid duplication of benefits. In this case, claimant had already been receiving Social Security retirement benefits for quite some time before he was injured. Accordingly, he was simultaneously receiving both Social Security and his wages. The temporary total disability compensation is intended to replace his wages. It does not replace both his wages and his Social Security benefits. There is no duplication. Therefore, as in *Dickens*,[16] the offset does not apply.

[16] *Dickens, supra.*

In addition, claimant's hours were reduced after he began receiving Social Security benefits. This constituted the change of circumstances or retirement as required in *McIntosh*.[17]

Claimant was earning $5.50 an hour and working 35 hours a week when he was injured, making his average weekly wage $192.50. His weekly temporary total disability compensation was $128.34. Obviously, there is no duplication or overpayment of compensation to which an offset is required to apply.

BOARD MEMBER

BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

[17] *McIntosh, supra.*